PITFALLS OF CRIMINAL LAW.

"Like that Serbonian bog
Betwixt Damiata and Mt. Cassius old,
Where armies whole have sunk".

IT IS conceded by most authorities on criminal jurisprudence that the strongest deterrent of crime is the certitude of punishment. Such is the peculiar blind folly frequent in human nature, due to the gambler's instinct, misplaced courage or native optimism, that even the most remote chance of impunity, however dubious or dangerous, is often boldly or eagerly taken; but let that remote chance, even if it consists of nothing more than a ray of hope, "the shade of the shadow of the ghost of a quantity", be eliminated, and let the punishment be made certain and reasonably severe, then even the boldest criminal will, as a matter of course, shrink from the venture as from the plague itself.

Jack London, in one of his thrilling tales of the Northland, emphasizes and makes clear this illogical idiosyncrasy of human nature. Two men, the story goes, both highly esteemed by all, and against the wishes of the camp where they lived, determined to have a duel with pistols at only a few paces. Both were dead shots and it meant almost certain death to both; friends argued in vain. There was the remote chance for life and that was sufficient for each. When they met at the agreed time and place, there was a crowd present carrying a rope. The eager duelists inquired as to the reason. The spokesman for the crowd answered that if either survived the pistol duel, they had decided to hang him for murder. The duel was called off at once. The would be participants were willing to take any chance, however hazardous, but when the remote chance was eliminated and a certainty remained, their courage failed. This general belief holds good as to the enforcement of punishment for crime. It is not so much the severity of the punishment as it is the certainty which counts.

In certain classes of crimes the apprehension of criminals and

the proof of guilt is beset by inherent difficulties and must remain doubtful. In other classes, sooner or later, the criminal must, by the inexorable law of average face a prosecution supported by adequate evidence, and the question of certainty of punishment will depend largely upon the certainty of the law.

It follows, as a natural deduction from this preamble, that it is of the utmost importance that the principles of criminal law, procedure and evidence should be definite and well settled. Such is by no means the case. Time and again questions arise in regard to which authorities are so discordant that to take any position is to risk a reversal.

It is the purpose of this article to point out a few of these legal pitfalls; two at present, others at a later date, and to offer some authorities upon which, in case of necessity or emergency, a hazardous guess may be predicated under the guise of an argument or judicial opinion. Both of the points here discussed are interesting on account of their frequent occurrence in criminal procedure.

As to the first question, the weight of authority is quite pronounced, but is based on judicial legislation which is most uncertain until the supreme court in question has finally legislated.

On the second point discussed, the authorities are so strong on each side that any committed court might easily decide either way.

1. *Can a Prior Conviction Be Proved by a Cross-Examination of the Witness, or Must the Record Be Introduced?*

At common law a witness was disqualified on conviction of treason, felony, or *crimen falsi*. The latter expression is of indefinite significance but is, as we know, defined by Greenleaf, to mean a crime which not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud.[1]

This rule as to disqualification has been in most States altered by statute. It is very generally provided that the conviction of crime may be shown not as a disqualification, but as affecting the credibility of the witness. Of course, if the statute says how the crime may be shown, the situation is clear, but in the

[1] 1 GREENLEAF, 373.

absence of any such provision in the statute, we are confronted with a legal problem which has been decided in different ways by the supreme courts of different States.

Greenleaf says: [2]

> "But, on the other hand, where the question involves the fact of a previous conviction, it ought not to be asked; because there is higher and better evidence which ought to be offered. If the inquiry is confined, in terms, to the fact of his having been subjected to an ignominious punishment, or to imprisonment alone, it is made, not for the purpose of showing that he was an innocent sufferer, but that he was guilty; and the only competent proof of this guilt is the record of his conviction. Proof of the same nature, namely, documentary evidence, may also be had of the cause of his commitment to prison, whether in execution of a sentence, or a preliminary charge."

This view is followed by the supreme court of Massachusetts in a strong and well reasoned case.[3] The court in its opinion said:

> "We see no sufficient reason for overruling *Com.* v. *Quin, ubi supra.* It has been an established rule of practice in this commonwealth for many years, and has its foundation in the common law of England. While the doctrine of *stare decisis* does not prevent re-examination and correction of principles previously declared, we have no question that the practice prevailing in this jurisdiction has been correctly expounded in the cases we now are asked to overrule. *It is the province of the court to declare the law, and not to legislate.* It is generally though not universally true, that wherever such cross-examination is permitted it is by virtue of a statute. See 2 Wigmore Ev., section 1270, note 5." (Italics ours.)

Wigmore says: [4]

> "On cross-examination of the witness to be impeached, may not the judgment of conviction be inquired about and answered orally instead of producing a copy of the record of the judgment? This involves a different principle, namely, the mode of evidencing the contents of the ju-

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[2] 1 GREENLEAF, 457.
[3] Commonwealth *v.* Walsh, 196 Mass. 369, 13 Am. and Eng. Ann. Cas. 642.
[4] 2 WIGMORE, §§ 980-5.

dicial record. *At common law, it was generally* held that a written copy, and not oral recollection, was the only proper mode; but this has almost everywhere been altered by the statute." (Italics ours.)

To the case of *Morrison* v. *State of Texas*,[5] there is appended a complete and able note on the subject of cross-examination as to previous prosecution. The following is an excerpt therefrom on page 1639:

"An Illinois statute of 1874 provided that conviction of a crime might be shown in criminal cases, etc., but did not state the method in which it might be shown. In applying this statute, where it was sought to show a former conviction on the cross-examination of the accused, the court said: 'In criminal cases the only charge which can be proved to affect the credibility of a witness is conviction of an infamous crime, and that conviction must be proved by the record, and cannot be proved by oral testimony.' *People* v. *Duggan* (1909) 150 Ill. App. 375.

"The rule stated in *People* v. *Duggan* (Ill.) *supra*, had previously been applied in *McKevitt* v. *People* (1904) 208 Ill. 460, 70 N. E. 693, wherein the accused was a witness in his own behalf, and a former conviction of crime was shown by introduction of the record, to affect his credibility. The court held that this was the proper and only means of showing a prior conviction.

"In *Daxanbeklar* v. *People* (1900) 93 Ill. App. 553, the court said: 'It is only conviction of an infamous crime which can be shown for the purpose of affecting the credibility of a witness, and on the trial of a criminal case such conviction can only be shown by the record.' And it was held improper to question the accused as to his prior sentence to reform school.

"In *People* v. *Maas* (1910) 154 Ill. App. 11, the court, excluding testimony as to previous conviction for violating the excise law, held that the only proper means of discrediting the witness was by proof of conviction of an infamous crime on the production of the record thereof. *Daxanbeklar* v. *People* (Ill.), *supra*.

"Likewise in *People* v. *Blevins* (1911) 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451, it was held improper on the question of credibility to cross-examine the accused as to a

[5] 6 A. L. R. 1607.

prior conviction and term of imprisonment, since parol proof was not sufficient for the establishment thereof.

"In *Advocate General* v. *Hancock* (1769) Quincy, (Mass.) 461, the court laid down the rule that production of the record was necessary to show a conviction.

"In *Com.* v. *Walsh* (1907) 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 Ann. Cas. 642, the court held it was not proper to ask the accused whether he had been convicted of crime, for the purpose of affecting his credibility, since there was a higher and better method of showing conviction, and that was by the record.

"And in *Com.* v. *Borasky* (Mass.) *supra,* the court held that a record of conviction was properly introduced to discredit the accused as a witness, and the witness might be asked if he was the person described in the record, but no attempt should be made to prove his conviction without production of the record."

In passing, the case of *People* v. *Blevins,* above cited, is very interesting. The court appointed two lawyers to defend a capital case. They appeared to be disinclined to undertake the task but the court insisted and they proceeded to do their best. Their unfortunate client was convicted and the verdict was the death penalty. On appeal one question raised was the incompetency of counsel appointed by the court; another question was the failure of the court to require the record of a prior conviction. Counsel at first failed to object but afterwards made a motion to strike out the evidence, which was overruled. The Supreme Court, without seeming to intend to be disagreeable, appears to indicate that the lower court, having appointed such inexperienced counsel, should have stricken out the testimony on its own motion. Apparently, it is the duty of court, under this decision, to act as assistant to counsel for the defense if inexperienced counsel are appointed to defend the accused.

Another peculiarity of the case is that the final decision of the court was entirely contrary to the great weight of authority in this country, although sustained by previous decisions in Illinois. By the weight of American authority the inexperienced counsel were originally not negligent in failing to object.

In *Hall* v. *Brown,*[6] the court said:

"Before the passing of the act of 1848, the mode in which

[6] 30 Conn. 551-557.

the credibility of a witness might be attacked was entirely settled. His general reputation for truth might be proved, but it could not be proved that he had spoken falsely, or even that he had testified falsely, in a particular instance, or that he had in fact committed any crime however infamous. Then came the statute of 1848, which provides that no person shall be disqualified as a witness by reason of his interest in the event of the suit as a party or otherwise, or by reason of his conviction of a crime, but such interest or conviction may be shown for the purpose of affecting his credit. Rev. Stat., tit. 1, Section 141. The statute therefore authorizes no other mode of proving a witness unworthy of credit because of his presumed insensibility to the obligations of an oath, as evidenced by his commission of an infamous crime, but the record of his conviction, because his conviction can be proved only by the record; and we think the strictness of the rule is founded in the soundest reasons of justice and of policy. If the question of the witness' guilt or innocence of crime in fact, were permitted to be tried, issues would often be so greatly multiplied that the merits of the principal cause on trial would be lost sight of, and the rights of the litigating parties sacrificed. And it would also be doing great injustice to the witness to subject him to trial for crime in a case to which he was not a party. The common law therefore determined wisely when it excluded all evidence of criminality of a witness except the record of his conviction. And we think the court ought not to depart from this wise and salutary rule any further than the plain import of the statute requires. The statute is an enabling or remedial one, and should be construed liberally in favor of the party for whose benefit it was made. It speaks only of persons who have been convicted of, not of those who have committed, crimes, and it provides that such conviction, not such commission, may be shown to affect the credit of the witness."

If a court goes astray on the subject of cross-examination in regard to prior convictions, it is certainly not for want of ample and learned authority on the subject.

In *Dotterer* v. *State*,[7] there is also an excellent note on this subject, from which the following is quoted:

"View that cross-examination is not a proper method. In other cases it is held that the conviction of a witness, as

[7] 30 L. R. A. (N. S.) 846.

affecting his credibility, must be shown by the record. *Murphy* v. *State,* 108 Ala. 10, 18 So. 557; *Thomtson* v. *State,* 100 Ala. 70, 14 So. 878 (*dictum*); *People* v. *McDonald,* 39 Cal. 697; *People* v. *Reinhart,* 39 Cal. 449; *People* v. *Buckner* (Cal.), 4 Pac. 489; *Hall* v. *Brown,* 30 Conn. 551; *State* v. *Fisher,* 1 Penn. (Del.) 303, 41 Atl. 208 (where the court seemed to place some weight on the fact that the record was of easy access, as it was in the same court); *Johnson* v. *State,* 48 Ga. 116 (holding it to be no error to refuse to compel a witness to answer, for the purpose of discrediting him, that he had pleaded guilty to various crimes, as the record of his plea was the best evidence; *Com.* v. *Quin,* 5 Gray, 478; *Com.* v. *Sullivan,* 161 Mass. 59, 36 N. E. 583; *Com.* v. *Walsh,* 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 A. & E. Ann. Cas. 642; *Clement* v. *Brooks,* 13 N. H. 92; *Kirschner* v. *State,* 9 Wis. 140. The principle of the last case was approved in *Ingalls* v. *State,* 48 Wis. 647, 4 N. W. 785, the court in the latter case having overlooked the Wisconsin statute on the subject until after the argument.

"But in *Childs* v. *State,* 58 Ala. 349, it was held that there was no error in permitting the question to be put to a witness on cross-examination as affecting his credibility, whether he had not pleaded guilty of stealing from a store in a certain place, it appearing that the trial in which the plea was made was before a justice of the peace, and it not appearing that any record was made of it.

"Where a witness for the prosecution in a criminal case was asked in his cross-examination whether he had not been in the house of correction, the court said the witness might answer or not as he pleased, and he declined to answer; the trial court ruled that the question need not be answered on account of the witness's privilege, and because the prison record was the proper mode of proof; and the appellate court held that the questions were improperly put, as prior convictions could only be proved by the record. *Com.* v. *Quin, supra.*

"In Illinois it is asserted in a number of cases that in a criminal case the proof of a witness's conviction of crime, as affecting his credibility, must be made by the record, but the decisions seem generally to have been grounded in whole or in part on other considerations; thus in *Bartholomew* v. *People,* 104 Ill. 601, 44 Am. Rep. 97, the defendant having denied that he had been in the penitentiary, it was held that it was error to admit any further evidence of his

conviction other than the record, and also that, to discredit the witness, a conviction must be of an infamous crime.

"Similarly, in *Kirby* v. *People,* 123 Ill. 436, 15 N. E. 33, where a defendant in a criminal case declined to answer whether he had been convicted of a certain crime, it was held to be error to admit in evidence an incomplete part of the record of conviction.

"In *Simons* v. *People,* 150 Ill. 66, 36 N. E. 1019, where the defendant was asked on cross-examination whether he had been convicted of a crime, and admitted the fact, it was held that while this was error, it would not require the reversal of the case, as the objection to the question was general, and not on the ground that the fact could not be proved by parol, particularly where the court later excluded the evidence. This case was followed in *O'Donnell* v. *People,* 224 Ill. 218, 79 N. E. 639, 8 A. & E. Ann. Cas. 123, as to the absence of a specific objection to proving a witness's conviction by parol.

"In *McKevitt* v. *People,* 208 Ill. 460, 70 N. E. 693, it was held to be error to show by a witness for the defendant in a criminal case, on cross-examination, that he had been in the penitentiary for robbery, but that the error was harmless, as the other testimony of the witness did not tend to show that the defendant was innocent of the crime for which he was being tried.

"Where a defendant jointly indicted with others refused counsel, and voluntarily took the stand and testified, and counsel for other defendants asked him on cross-examination whether he had been convicted of larceny (an infamous crime), it was held to be error for the court to disallow the question, as this amounted to the technical objection that the record was the best evidence, and, as the witness had refused counsel, such technical objection ought not to have been taken unless he took it personally, in view of his testimony against the other defendants. *Looney* v. *People,* 81 Ill. App. 370.

"In *Davanbeklar* v. *People,* 93 Ill. App. 553, it was held that a question to a witness in a criminal case, 'Were you ever in the Reform School of the State of Iowa?' was properly excluded, as the only conviction which could be shown to affect credibility was of an infamous crime, and that in a criminal case that could only be shown by the record."

The weight of authority, however, is strongly in favor of the proposition that the prior conviction may be shown by the cross-

examination of the witness and that the record is unnecessary. In 28 R. C. L., Section 213, page 626, it is said:

> "When it is sought to prove a conviction for the purpose of impeaching a witness, the record of the conviction is the best evidence and should be introduced, and it has been held in numerous cases that this is the only way in which the conviction can be proved. The weight of authority however clearly sustains the right to show such conviction by cross-examination."

Wigmore says, as follows: [8]

> "The result is that three types of rule now obtain in the different jurisdictions: (1) the requirement of a copy in all cases; (2) the allowance of an admission on cross-examination of the witness to be impeached but the requirement of a copy or an abstract when proof is made by another witness,—this rarely by common-law decision, but widely by statute; (3) the allowance of recollection-testimony either from the witness to be impeached or from another—this rarely, and by statute only. The second form is the only proper one, and now obtains in the majority of jurisdictions."

At 40 Cyc. page 2641, it is stated: "And if he admits his conviction this is sufficient and production of the record is not necessary."

And again, in 40 Cyc. page 2622, it is stated: "A witness may be asked on cross-examination as to whether he had been convicted of a crime."

The note on the succeeding page states that the rule stated in the text is denied in a few cases which hold that a conviction of crime can be proved only by the record.

In the sixteenth edition of Greenleaf,[9] the law is stated thus:

> "('b') Where the conviction is sought to be proved by questioning the witness himself on cross-examination, the objection arises that, by the rule of Primariness (post 563a; ante, 375), the contents of the record cannot be proved orally; and this objection was originally held fatal. But as there was in truth no danger in accepting the witness' own admission that he was convicted, and as any other method usually involved inordinate expense, the propriety of proving the conviction by cross-examination has come in most

[8] Section 1270. Page 1542.
[9] Section 461-B.

jurisdictions to be conceded, usually by statute, but occasionally by judicial decision."

In *Dickinson* v. *Watts and Flint,*[10] the Supreme Court said:

"In *Langhorne* v. *Com.,* 76 Va. 1012-1016, the right to impeach a witness on cross-examination by proving that he has been convicted of an offense which involved his character for truth was impliedly recognized."

The exact point considered in this article does not appear to have been made in either of these cases.

In Reynolds Trial Evidence, that very concise and reliable *vade mecum,* the law is stated as follows:[11]

"There has been considerable conflict of authority in this country, (see 1 Gr. Ev., 457; *Newcomb* v. *Griswold,* 24 N. Y., 298; *contra, State* v. *March,* 1 Jones' (N. C.) L., 526; and *State* v. *Garrett,* Busb. (N. C.) L., 327), as to whether, if objection be made, a witness can be asked if he has been previously convicted of any crime or misdemeanor, inasmuch as the record of the judgment is the best evidence of such conviction; but this technicality does not necessarily stand in the way of his being asked whether he has ever been in jail or the penitentiary, and if so, how long he has been there. *Real* v. *People,* 42 N. Y., 270-280; 1, What. Ev., 541, note. The modern tendency, however, is to allow such questions and to require an answer to them when they appear to be put for the purpose of honestly discrediting the witness. Whar. Cr. Ev., 474; *State* v. *Bacon,* 13 Oreg., 143; 393; 57 Am. Rep., p. 8, and cases cited in note p. 16. Also, *Com.* v. *Racco,* 225 Pa. St., 113, 116: 73 Atl., 1067: 133 Am. St. R., 872. In England it has been provided by statute (28 and 29 Vic., c. 18, Section 6) that a witness may be questioned as to whether he has been convicted of any felony or misdemeanor; and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove such conviction by a certificate of the clerk of the court where he was convicted. Tay. Ev., 1434."

From the above it seems to be clear that the weight of authority is in favor of allowing the conviction to be proved on

[10] 69 S. E. 328, 111 Va. 394.
[11] Page 282, note 30.

cross examination for the purpose of affecting the credibility of the witness, but as hereinbefore stated, there remains a reasonable doubt in cases in which neither legislature nor the Supreme Court has acted.

2. *Can statements made in the presence of the accused when under arrest be introduced in evidence against him, the accused remaining silent?*

On this point the authorities cited,[12] are very nearly evenly balanced. The Supreme Courts of eight States, in accordance with these citations, appear to hold one way, and those of seven States take a contrary view. Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Oklahoma, Rhode Island and Texas, according to Corpus Juris, hold that the statements are inadmissible. On the other hand, Alabama, Arkansas, California, New York, Ohio, Tennessee and West Virginia, as cited, according to Corpus Juris, hold that the statements are admissible.

In a note appended to *Merriweather* v. *Com.*,[13] the following is said:

> "It may be stated as a general rule that statements made to or in the presence of a person accusing him of the commission of or complicity in a crime are, when not denied, admissible against him as warranting an inference of the truth of the statement."

There is a very complete review of the authorities in this note. In *People* v. *Amaya,*[14] the court said:

> "The leading authority upon this proposition is *Com.* v. *Kenney,* 12 Metc. (Mass.) 235, 46 Am. Dec. 672, in which the opinion of the court was delivered by Chief Justice Shaw. This I say is the leading authority, not because it sustains the proposition to its full extent, but only because it is the sole basis of all the subsequent decisions which do fully sustain the proposition. A careful examination of Judge Shaw's opinion, however, will show that he did not decide, or intend to be understood, that the mere fact that an accused person is under arrest will always require the exclusion of statements made in his presence. This is what he says: 'In some cases, where a similar declaration

[12] 16 C. J. 633.
[13] 4 Ann. Cas. 1033-1042.
[14] 66 Pac. 796.

is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: First, whether he hears and understands the statement, and comprehends its bearing; and, secondly, whether the truth of the facts embraced in the statement is within his own knowledge or not, whether he is in such a situation that he is at liberty to make any reply, and whether the statement is made under such circumstances and by such persons as naturally to call for a reply if he did not intend to admit. If made in the course of any judicial hearing, he could not interfere and deny the statement. It would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge, if the statement is made by a stranger whom he is not called on to notice, or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them; but in this present case he has reported the facts on which the incompetency of the evidence depended, and submitted it, as a question of law, to the court. The circumstances were such that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer who first brought the defendant to the watch house, he had certainly no occasion to reply to. The subsequent statement is made in the hearing of the defendant, of which we think there was evidence, was made whilst he was under arrest, and in the custody of persons having official authority. They were made by an excited, complaining party, to such officers, who were just putting him into confinment. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called upon to answer.' From this it appears very clearly that the question was submitted to the supreme court of Massachusetts to be decided upon the special facts of that case, and that the proposition decided was merely that under all the circumstances there appearing, including the fact of ar-

rest, the prisoner might well have supposed that he had no right to say anything until regularly called upon to answer. In other and subsequent cases in Massachusetts, Texas, Iowa and Missouri, *Com.* v. *Kenney* has been construed as holding that the mere fact of arrest is sufficient ground in all cases to exclude statements affecting the accused made in his presence, and it has been adopted and followed in that sense. We think, for the reasons above stated, that it does not sustain the proposition to which it has been so frequently cited. It does not make the fact that the accused is in custody the final test, but has regard to all the circumstances surrounding him at the time, in determining whether he would feel free to act or reply to the accusation; and this, except as the preliminary ruling, is a question for the jury, rather than for the court. In the present case we can see no reason to conclude that the court erred in holding that the appellant was entirely free to reply if he had chosen so to do. And moreover, we do not feel at liberty to disregard the authority of the cases above cited from our own decisions."

Wigmore states the law thus:[15]

"Whether the fact that the party is at the time under arrest creates such a situation has been the subject of opposing opinions; a few Courts (for the most part in acceptance of an early Massachusetts precedent), by a rule of thumb exclude the statement invariably; but the better rule would seem to allow some flexibility according to circumstances."

In *Fry* v. *Stowe*,[16] it was held that declarations of a mere stranger to a controversy in the matter, though made in the presence of a party, though not addressed to him, and to which no reply is required or made, cannot be given in evidence as an admission of such party. In other words, the Supreme Court of Virginia has held that the mere fact that statements are made in the presence of a party, does not make such declarations evidence.

The writer recalls a case in which a man was arrested for bootlegging. When under arrest, his wife appeared and in a sorrowful tone said: "I told you if you kept on making whiskey you would certainly get caught. I have told you again

[15] II WIGMORE, 1072, page 1258.
[16] 96 Va. 13.

and again and you would not listen to me." To this the accused made no reply; probably there was no reply that he could make. Certainly, to refuse admission of evidence of this kind is eliminating testimony of strong probative value.

The authorities in this regard appear to be in hopeless conflict, but the most reasonable view is to make the evidence dependable upon the circumstances of the case. The objection to this view is that it leaves the law in an uncertain state, as to the exact circumstances necessary in order to render the testimony admissible.

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